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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DESHON BRITT, Defendant and Appellant.	B297588 (Los Angeles County Super. Ct. No. TA098926)

APPEAL from order of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Amanda V. Lopez and Nicholas J. Webster, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Deshon Britt appeals from the superior court's order denying his petition under Penal Code section 1170.95,[1] which allows certain defendants convicted of murder under a felony murder or natural and probable consequences theory to petition the court to vacate their convictions and for resentencing. Britt argues that his petition stated a prima facie case for relief under the statute and that the superior court erred in denying the petition without a hearing and without appointing him counsel. Britt, however, was not convicted under a felony murder or natural and probable consequences theory, which the superior court properly determined after reviewing this court's opinion in Britt's prior appeal. Therefore, Britt did not state a prima facie case for relief, and the superior court did not err in denying his petition.

PROCEDURAL AND FACTUAL BACKGROUND

A. *A Jury Convicts Britt of First Degree Murder, and This Court Affirms His Conviction*

In July 2008 Britt confronted Aaron Patterson, who was walking with two companions outside a liquor store, with the common gang challenge, "Where are you from?" Patterson's response, "8 Trey Gangster Crip," indicated he belonged to a rival gang. Britt responded to Patterson with "99 Watts Mafia Crip" and went into the liquor store to get his fellow gang member, Milton Jones.

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[1] Statutory references are to the Penal Code.

Outside the store, Jones and Patterson first argued and then fought. Patterson knocked Jones and Britt to the ground. Jones pulled out a gun and shot Patterson in the back of the head as Patterson tried to run away.

The jury found Britt guilty of first degree murder and found true firearm and gang allegations. The trial court sentenced Britt to prison for 50 years to life.

In June 2011 this court affirmed Britt's conviction. We stated: "There was sufficient evidence for a reasonable jury to find that Britt aided and abetted Jones in the murder . . . . [¶] Looking at the factors for specific intent, there is sufficient evidence to conclude Britt shared the same intent as Jones. The trial court noticed Britt's statements exhibited a 'consciousness of guilt' to his family since he was so obsessed with taking his clothes off to avoid the police; instead, for example, of establishing his innocence or that he did not know Jones had a gun. Britt also demonstrates his shared specific intent when he retrieved Jones to reinitiate the confrontation with Patterson. A brief fistfight ensued. Although Britt argues that he only wanted to fight Patterson, his retrieval of Jones belies that argument. Patterson began to *run away* from the fight. Jones tried to shoot Patterson, but his (Jones) gun jammed. Jones fixed his gun and then shot Patterson in the back of his head. A jury may reasonably infer that Britt was an aider or abettor because there was no evidence that Britt was surprised by Jones's conduct or too afraid to interfere with it. [Citation.] In fact, Britt fled the scene at the same time as Jones only *after* the shooting and the murder was complete." (*People v. Britt* (June 6, 2011, B218965) [nonpub. opn.].) This court also concluded there was substantial evidence Britt premeditated and deliberated Patterson's murder.

B. *Britt's Petitions for Resentencing*

On January 1, 2019 Britt, representing himself, filed a form petition under section 1170.95, asking the court to vacate his first degree murder conviction and to resentence him.[2] In his petition, Britt checked boxes stating that he "could not now be convicted of 1st or 2nd degree murder because of changes made to Penal Code §§ 188 and 189, effective January 1, 2019" and that "I was convicted of 1st degree felony murder and I could not now be convicted because of changes to Penal Code § 189." Britt also checked the boxes stating "I was not the actual killer," "I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree," and "I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony." Britt attached to his petition a memorandum setting forth section 1170.95, subdivisions (a) and (b), a declaration stating the charges against him, a request for appointment of counsel, copies of the felony complaint and information, the versions of CALCRIM No. 520 and CALCRIM No. 521 the court give to the jury, a motion regarding the admissibility of certain statements by Britt the prosecution contended were admissible as declarations against penal interest, and excerpts of the closing arguments. The People opposed Britt's petition, arguing the statute that enacted section

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[2] We described this form petition, which is available on the Internet, in *People v. Verdugo* (Jan. 15, 2020, B296630) ___ Cal.App.5th ___, ___, fn. 2 [2020 WL 219302, p. 2, fn. 2].

1170.95, Senate Bill No. 1437, was unconstitutional and violated the separation of powers doctrine.[3]

On March 7, 2019 the superior court, after reviewing the available trial record and this court's 2011 opinion in Britt's direct appeal, summarily denied the petition without a hearing. The court stated: "As the appellate court pointed out [in] the affirmed decision, defendant Britt initiated the confro[n]tation with the victims and then retrieved co-defendant (and shooter) Jones in order to reinitiate the confrontation with the deceased victim. Eyewitnesses and surveillance video establish the defendant as starting the initial confrontation by asking the victim 'Where are you from'? After the initial confrontation by defendant Britt, Britt then goes back into the liquor store to retri[e]ve co-defendant Jones, who is armed with a gun, when both seek out the victims to confront them again. [¶] The petitioner was a major participant in the crime and acted with reckless indifference. [Citation.] As noted in the appellate record, the defendant was known to approach young males at the location where the crime occurred and ask 'Where are you from.' In this case, after the victim responded with a rival gang name, defendant Britt immediately retrieved co-defendant Jones (who was armed with a gun) and re-confronted the victim before he was shot to death. Also, looking at the factors for specific intent, the trial court noted [Britt's] statements exhibited a 'consciousness of guilt' to his family since he was so obsessed with taking his clothes off to avoid the police instead of, for example, establishing his innocen[c]e or that he did not know co-defendant

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[3] The court in *People v. Lamoureux* (2019) 42 Cal.App.5th 241 and *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270 held Senate Bill No. 1437 is not unconstitutional.

Jones had a gun." Britt timely appealed the order denying his petition.

DISCUSSION

A. *Senate Bill No. 1437 Changes the Felony Murder and Natural and Probable Consequences Doctrines*

Senate Bill No. 1437 became effective on January 1, 2019. (See Stats. 2018, ch. 1015, § 4). The purpose of the new legislation was "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); see *People v. Larios* (2019) 42 Cal.App.5th 956, 964.) To accomplish this purpose, Senate Bill No. 1437 amended section 188 to provide "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Senate Bill No. 1437 also added section 189, subdivision (e), which provides that a person is liable for murder "only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (See *Larios*, at p. 964.)

"The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. . . . First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is 'an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189.'" (*People v. Chun* (2009) 45 Cal.4th 1172, 1182; accord, *In re White* (2019) 34 Cal.App.5th 933, 946; see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1142, fn. 3 [section 188, subdivision (a)(3) "brings into question the ongoing viability of second degree felony murder in California"].)

"There are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted."'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1268; see *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1012-1013 ["Excepting the felony-murder rule, an accomplice may be convicted of a crime under one of two alternative theories: direct aiding and abetting liability and the natural and probable consequences doctrine."]; *People v. Gastelum* (2019) 40 Cal.App.5th 772, 777 ["'[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine,

an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted""].) Under the direct theory, the prosecution "must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] 'The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.'" (*People v. Gomez* (2018) 6 Cal.5th 243, 279; see *People v. Penunuri* (2018) 5 Cal.5th 126, 146 [""[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.""].)

B. *Section 1170.95 Creates a Procedure for Certain Defendants To File a Petition To Vacate Their Sentences and for Resentencing*

Senate Bill No. 1437 also added section 1170.95, subdivision (a), which provides that "[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the

petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a); see *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417 [§ 1170.95 provides "a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions"]; *People v. Martinez* (2019) 31 Cal.App.5th 719, 722 [same].)

Section 1170.95, subdivision (b)(1), provides: "The petition shall include all of the following: [¶] (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel." Section 1170.95, subdivision (b)(2), states: "If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information."

Section 1170.95, subdivision (c), provides that, once the petition is filed, "[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the

petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

Finally, section 1170.95, subdivision (d)(1), states: "Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been [*sic*] sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause."

C. *The Superior Court Did Not Err in Determining Whether Britt's Petition Stated a Prima Facie Case Without Appointing Counsel or Issuing an Order To Show Cause*

Britt contends his petition stated a prima facie case for relief under section 1170.95, subdivision (a), by alleging he was not the actual killer and by checking boxes on the pre-printed form indicating that he was convicted "pursuant to the felony murder or and [*sic*] the natural and probable consequences doctrine" and that he "could not now be convicted of 1st or 2nd degree murder because of changes made to Penal Code §§ 188 and 189, effective January 1, 2019." According to Britt, these allegations (and the documents he attached to his petition) were

sufficient under section 1170.95 to state a prima facie case, which in turn required the superior court to appoint counsel and issue an order to show cause.[4]

Britt's contentions lack merit. As this court recently explained in *People v. Verdugo* (Jan. 15, 2020, B296630) ____ Cal.App.5th ___ [2020 WL 219302] (*Verdugo*), "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95—that is, a prima facie showing the petitioner may be eligible for relief because he or she could not be convicted of first or second degree murder following the changes made by [Senate Bill No.] 1437 to the definition of murder in sections 188 and 189." (*Verdugo*, at p. ___ [p. 1].) We further explained: "[P]ursuant to section 1170.95, subdivision (b)(2), the sentencing court may deny a petition without prejudice if any of the information required by subdivision (b)(1) is missing from the petition and cannot be readily ascertained by the court. This initial review thus determines the facial sufficiency of the petition. Subdivision (c) then prescribes two additional court reviews before an order to show cause may issue, one made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner

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[4] We review questions of statutory construction de novo. (*People v. Tran* (2015) 61 Cal.4th 1160, 1166; *Verdugo, supra*, ___ Cal.App.5th at p. ___, fn. 8 [p. 5, fn. 8].)

has made a prima facie showing he or she is entitled to relief." (*Verdugo*, at p. ___ [p. 4]; see *People v. Lewis* (Jan. 6, 2020, B295998) ___ Cal.App.5th __, ___ [2020 WL 57841, p. 5].) Therefore, the superior court did not err in determining whether Britt stated an initial prima facie case for relief under section 1170.95 without appointing counsel or issuing an order to show cause. (See *Lewis*, at p. ____ [p. 6] ["the trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner 'falls within the provisions' of the statute," and because "the trial court denied defendant's petition based upon his failure to make a prima facie showing that the statute applies to his murder conviction, defendant was not entitled to the appointment of counsel"].)

D. *The Superior Court Properly Considered This Court's Prior Opinion in Ruling Britt Failed To State a Prima Facie Case*

In this court's opinion affirming Britt's conviction, we concluded there was substantial evidence Britt aided and abetted Jones in the murder and shared Jones's intent. We cited evidence that Britt initiated the confrontation that led to Patterson's murder by making a gang challenge and that Britt summoned his fellow gang member to shoot Patterson. We held a jury reasonably could have concluded Britt knew Jones was armed with the gun because they were in the same criminal street gang and spent time together on a regular basis, including prior to the shooting. In denying Britt's petition under section 1170.95, the trial court relied on the facts and conclusions in our prior opinion.

Britt argues the superior court erred "by ignoring the requirements of § 1170.95 that required appointment of counsel . . . and by stepping outside the four corners of [the] petition to conduct an unauthorized investigation." Britt also argues the court "erred by relying on this [court's] prior opinion to assess whether a prima facie showing was made in the petition." According to Britt, the superior court "not only erred at the initial stage by going beyond its function to determine if the three required allegations were set forth in the petition, it further erred by engaging in an analysis of the evidence as outlined in the Court of Appeal opinion and making credibility determinations without either party being afforded an opportunity to participate in a hearing and present additional evidence."

This court rejected similar if not the same arguments in *Verdugo*, which held the superior court, in evaluating a petition under section 1170.95, should determine from all readily ascertainable information "whether there is a prima facie showing the petitioner falls within the provisions of the statute." (*Verdugo*, *supra*, ___ Cal.App.5th at p. ___ [p. 6].) We stated: "Although subdivision (c) does not define the process by which the court is to make this threshold determination, subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature's intent. . . . [S]ubdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the court in connection with the first prima facie determination required by subdivision (c)." (*Verdugo*, at p. ___ [p. 5].) We further held that

the superior court should examine not only "the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment," but also any "court of appeal opinion, whether or not published, [because it] is part of the appellant's record of conviction." (*Ibid.*; see *People v. Lewis*, *supra*, __ Cal.App.5th at p. ___ [p. 4] ["Allowing the trial court to consider its file and the record of conviction is also sound policy."]; Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2013) ¶ 23:51(H)(1), pp. 23–150 to 23–151 ["It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief."].)

Britt's petition attached the felony complaint, the information, two jury instructions, a motion filed by the prosecution, and portions of the parties' closing arguments. Neither these documents nor this court's prior opinion refers to the felony murder rule or aiding and abetting under a natural and probable consequences theory. To the contrary, this court's prior opinion shows that Britt was convicted of murder as a direct aider and abettor who shared the shooter's intent to kill, not under a natural and probable consequences theory. (See *People v. Cornelius* (Jan. 7, 2020, B296605) ___ Cal.App.5th ___, ___ [2020 WL 63835, p. 2] [petitioner under section 1170.95 was not entitled to appointed counsel where the petitioner "was ineligible for relief because he was not convicted of felony murder or murder as an aider or abettor under a natural and probable consequences theory"].) Indeed, although the superior court did

not have a complete set of jury instructions from Britt's trial when the court denied Britt's petition under section 1170.95, the record in the prior appeal shows the trial court did not instruct the jury on the natural and probable consequences doctrine (CALCRIM No. 402) or the felony murder rule (CALCRIM No. 540A). Therefore, the superior court did not err in ruling Britt did not state a prima facie case for relief. (See *People v. Lewis*, *supra*, ___ Cal.App.5th at p. ___ [p. 4] ["'if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing'"].)

DISPOSITION

The order denying the petition is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.